Meow Loong Onn v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 41-33-96
KC VOHRAH J
16 JULY 1996

Criminal Procedure *— Jurisdiction of court — Magistrate's court — Functus officio — Whether a magistrate who had earlier imposed a fine in relation to a charge could act further in the matter by imposing a second fine in relation to the same charge — Whether a magistrate could take the role of an enforcement officer exercising executive powers in finding the accused guilty*

Criminal Law *— Federal Territory (Planning) Act — Carrying out development works on premises without a development order — Whether accused ought to be found guilty for a continuing offence of not carrying out works in accordance with the approved plan — Federal Territory (Planning) Act 1982 ss 20 & 26*

The appellant was charged in the magistrates' court with the offence of carrying out development work on his premises without a development order issued under the Federal Territory (Planning) Act 1982 ('the Act'). On 2 November 1995, the appellant pleaded guilty and was fined accordingly. However, the magistrate adjourned the case several times until 8 February 1996, whereby the magistrate then further fined the appellant RM500 per day from 3 November 1995 till 8 February 1996 and thereafter until the premises were abolished, for a 'continuing offence' under s 26(1) of the Act for not carrying out works in accordance with the plan that had been approved. The appellant appealed against the RM500 per day fine.

Held, allowing the appeal and setting aside the fine of RM500 per day:

The case against the appellant ended when he pleaded guilty to the offence he was charged with on 2 November 1995. By then, the magistrate had fulfilled his judicial function in relation to that charge and he no longer had any judicial power to act further in the matter. Thus, the magistrate's acts in bringing up the case for mention in court against the appellant several times before he fined him for the second time were completely without any legal foundation (see p 615C, F–G).

Obiter:

In this case, no charge was at all preferred against the appellant in respect of the so-called continuing offence. The appellant was said to be charged for a continuing offence of not carrying out works in accordance with the plan that had been approved, this being clearly of a different nature from the offence the appellant was charged with on 2 November 1995 (that of carrying out works without a development order). Thus, what the magistrate did after he became functus officio was to take the role of an enforcement officer, exercising executive powers which he was not entitled to do.

If a person had continued carrying on development work after conviction for the first commission of the offence or if he did not, after he had received an approved plan for his works, comply with the approved plan, then it is for the prosecution to frame a new appropriate charge and summon the person to court where he has to be asked by the magistrate to plead to the charge (see pp 615I and 616A–C); *Tan Sin v PP* [1969] 1 MLJ 230 followed.

[Bahasa Malaysia summary

Perayu dipertuduhkan di mahkamah majistret dengan kesalahan menjalankan kerja pembangunan di premisnya tanpa perintah pembangunan yang dikeluarkan di bawah Akta (Perancangan) Wilayah Persekutuan 1982 ('Akta tersebut'). Pada 2 November 1995, perayu mengaku salah dan didenda. Namun demikian, majistret menangguhkan kes beberapa kali sehingga 8 Februari 1996, apabila majistret seterusnya mendenda perayu RM500 sehari dari 3 November 1995 sehingga 8 Februari 1996 dan selepas itu sehingga premis diruntuhkan, untuk satu 'kesalahan berterusan' di bawah s 26(1) Akta tersebut kerana tidak menjalankan kerja menurut pelan yang diluluskan. Perayu membuat rayuan terhadap denda RM500 sehari.

Diputuskan, membenarkan rayuan dan mengetepikan denda RM500 sehari:

Kes terhadap perayu tamat apabila dia mengaku salah atas kesalahan yang dipertuduhkan pada 2 November 1995. Pada masa itu, majistret telah memenuhi fungsi kehakiman berhubung dengan pertuduhan itu dan beliau tidak lagi mempunyai apa-apa kuasa kehakiman untuk bertindak selanjutnya dalam perkara itu. Oleh itu, tindakan majistret dalam membangkitkan kes untuk sebutan di mahkamah terhadap perayu beberapa kali sebelum mendenda perayu buat kali yang kedua langsung tidak mempunyai sebarang asas undang-undang pada keseluruhannya (lihat ms 615C, F–G).

Obiter:

Dalam kes ini, tiada pertuduhan dibuat sama sekali terhadap perayu berkaitan dengan kesalahan berterusan yang dikatakan. Perayu dikatakan dipertuduhkan atas kesalahan berterusan kerana tidak menjalankan kerja menurut pelan yang telah diluluskan, dan ini jelas tidak sama cirinya dengan kesalahan dengan mana perayu dipertuduhkan pada 2 November 1995 (iaitu menjalankan kerja tanpa perintah pembangunan). Dengan itu, apa yang dilakukan oleh majistret selepas beliau menjadi functus officio adalah mengambil peranan seorang pegawai penguatkuasa, yang melaksanakan kuasa eksekutif dan beliau tidak berhak berbuat demikian.

Jika seseorang telah terus menjalankan kerja pembangunan selepas sabitan untuk berlakunya kesalahan pertama atau jika dia tidak, selepas menerima pelan yang diluluskan untuk kerjanya, mematuhi pelan yang diluluskan, maka adalah menjadi tugas pihak pendakwa

untuk membuat pertuduhan baru yang wajar dan menyaman orang itu ke mahkamah di mana dia akan disuruh oleh majistret untuk mengaku salah atau tidak bersalah atas pertuduhan (lihat ms 615I dan 616A–C); *Tan Sin v PP* [1969] 1 MLJ 230 diikut.]

Notes

For cases on jurisdiction of the magistrate's court, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1536–1572.

Case referred to

Tan Sin v PP [1969] 1 MLJ 230 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6)
Federal Territory (Planning) Act 1982 ss 20(1)(a), 26(1), 26(1)(b)

Appeal from: DBR–87–3147–95 (Magistrates' Court, Kuala Lumpur)

Mah Weng Kwai (*Mah Weng Kwai & Co*) for the appellant.
Mohd Ghazali bin Mohd Taib (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

KC Vohrah J: In this case, the appellant was charged in the magistrates' court situated at the City Hall Complex for the offence of carrying out development work on 23 June 1993 on his premises without a development order issued under the Federal Territory (Planning) Act 1982 ('the Act'), an offence under s 20(1)(a) of the Act and punishable under s 26(1)(b) thereof. The appellant pleaded guilty and he was fined RM2,000 in default two months' imprisonment. The magistrate, however, did not record a finding of guilt or conviction before imposing the fine. There was no appeal against this order but acting in revision, I directed a finding of guilt and a conviction be recorded in respect of this offence.

The provision under which he was charged reads as follows:

> 20 (1) ..., no person shall commence, undertake, or carry out any development irrespective of whether or not the development is in conformity with the development plan unless —
>
> (a) a development order granting planning permission in respect of the development has been issued to him under this Act; ... .

The punishable section reads as follows:

> 26 (1) Any person who whether at his own instance or at the instance of any other person —
>
> ...
>
> (b) commences, undertakes or carries out development in contravention of sub-s (1) of s 20; ...

A is guilty of an offence and on conviction is liable to a fine not exceeding fifty thousand ringgit and in the case of a continuing offence to a further fine which may extend to five hundred ringgit for every day during which the offence continues after conviction for the first commission of the offence.

B As was stated earlier, there was no appeal against the fine imposed for the first commission of the offence. The appeal was against the fine of RM500 per day from 3 November 1995 to 8 February 1996, which the magistrate said in his grounds of decision was a fine imposed for a continuing offence under s 26(1)(b) of the Act.

C The case against the appellant should have ended on 2 November 1995, the day that he pleaded guilty to the offence that he was charged with, the offence having been committed on 23 June 1993. But the magistrate instead adjourned the case by fixing the case for mention on 4 December 1995 against the appellant. There is a notation in the notes of proceedings against the date 4 December 1995 that the appellant appeared D in court and that the court fixed 8 January 1996 for mention again. On 8 January 1996, the appellant appeared in court and the prosecuting officer requested a new date of mention and stated that the investigation report [laporan siasat] was not ready yet. The court fixed 8 February 1996 as the next mention date.

E On 8 February 1996, the appellant appeared and the prosecuting officer then stated that investigations revealed that although a plan had been approved (for the new premises), the works did not conform to the plan. The appellant, according to the record, had nothing to say. The magistrate then fined the appellant RM500 per day from 3 November 1995 till 8 February 1996 and thereafter until the premises were demolished.

F It will be noticed that the magistrate was functus officio after he had fined the appellant RM2,000 in default two months' imprisonment on 2 November 1995 in respect of the offence committed on 23 June 1993 as stated in the charge; the magistrate had fulfilled his judicial function in relation to that charge against the appellant and he no longer had any G judicial power to act further in the matter against the appellant. Thus, his acts in bringing up the case for mention in court against the appellant several times before he fined him for the second time were completely without any legal foundation.

The magistrate must have been misled by the language used in H s 26(1) of the Act relating to a 'continuing offence' and thought he had power to continue the proceedings and he adopted a procedure which is neither provided in the Act nor in the Criminal Procedure Code (FMS Cap 6). And it has to be noted that no charge was at all preferred against the appellant in respect of the so-called continuing offence. To be noted too is that the appellant was charged for a continuing offence which I the prosecuting officer stated was one of not carrying out works in accordance with the plan that had been approved (in respect of the premises), this being clearly of a different nature from the offence the appellant was charged with on 2 November 1995 (that of carrying out works without a development order). What the magistrate did after he

became functus officio was to take the role of an enforcement officer. He anticipated the commission of an offence and appeared to call for investigation and in fact looked at investigation reports, acting like an enforcement officer exercising executive powers. A magistrate, however, exercises judicial powers and has no power to exercise such executive powers while on the bench.

If a person had continued carrying on development work after conviction for the first commission of the offence or if he did not, after he had received an approved plan for his works, comply with the approved plan (see eg *Tan Sin v PP* [1969] 1 MLJ 230), then it is for the prosecution to frame the appropriate charge and summon the person to court where he has to be asked by the magistrate to plead to the charge.

In the circumstances of the case, I allowed the appeal and the fine of RM500 per day for the so-called continuing offence was set aside. In respect of the charge dealt with on 2 November 1995, as stated earlier, I directed that a finding of guilt and a conviction be recorded.

Appeal allowed.

Reported by Tey Tsun Hang